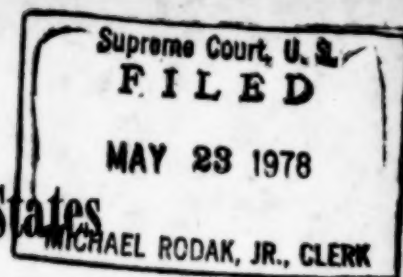


IN THE
Supreme Court of the United States



October Term, 1977
No. 77-1535

DAVID L. HEILMAN,

Appellant,

vs.

A & M RECORDS, INC., a California Corporation,

Appellee.

On Appeal From the Supreme Court of the State of California.

**Motion to Dismiss Appeal or, in the Alternative,
to Affirm.**

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On Appeal From the Supreme Court of the State of California.

**Motion to Dismiss Appeal or, in the Alternative,
to Affirm.**

Pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, appellee A & M Records, Inc. (plaintiff below) moves that this appeal be dismissed on the ground that this Court does not have jurisdiction thereof, appellant not having challenged the validity of any state statute on the grounds of its repugnancy to the Constitution, treaties or laws of the United States. Appellee alternatively moves that the judgment below be affirmed because the questions raised turn upon state law and, in any event, are so unsubstantial as not to need further argument.

Statement of the Case and Proceedings Below.

Appellant has mischaracterized both the facts and the proceedings below. The findings of fact and conclusions of law of the trial court are annexed at pages 28-42 of the Appendix to the Jurisdictional Statement ("Juris. Stmt. Appen."). The decision of the California Court of Appeal¹ accurately summarizes the facts as found by the trial court.² The pertinent facts respecting appellant's conduct are also stated in six prior reported decisions involving appellant.³

The following facts are particularly pertinent to this appeal.

Appellee is a Los Angeles based record company which owns, manufactures and sells recorded musical performances by popular artists in the form of disc phonograph records and pre-recorded magnetic tapes. Appellant is an admitted record and tape pirate,⁴ who conducted his record and tape piracy through his co-defendant, Economic Consultants, Inc., now known as E-C Tape, Inc. and doing business as E-C Tape Service (hereinafter referred to as "E-C"). Appellant

¹*A & M Records, Inc. v. Heilman*, 75 Cal. App. 3d 554, 142 Cal. Rptr. 390 (1977); the decision also appears in Juris. Stmt. Appen. at 4-22.

²*Id.*, 75 Cal. App. 3d at 560-61, 142 Cal. Rptr. at 394-95, Juris. Stmt. Appen. at 5-8.

³See cases cited note 5 *infra*.

⁴"Record piracy" and "tape piracy" are the terms commonly employed to describe the theft of recorded performances by the manufacture and sale of unauthorized duplicates of records and tapes. See *Goldstein v. California*, 412 U.S. 546, 549 (1973); *Aeolian Co. v. Royal Music Roll Co.*, 196 F. 926 (W.D.N.Y. 1912); *Shapiro, Bernstein & Co. v. Remington Records, Inc.*, 265 F.2d 263, 269, 273 (2d Cir. 1959); *Tape Indus. Ass'n of America v. Younger*, 316 F. Supp. 340, 351 (C.D. Cal. 1970), appeal dismissed, 401 U.S. 902 (1971), *aff'd per curiam*, No. 26,628 (9th Cir. Oct. 1, 1973); Note, *Piracy on Records*, 5 Stan. L. Rev. 433 (1953).

and E-C have been enjoined by the Circuit Court of Milwaukee County, Wisconsin from engaging in record and tape piracy in any place (as distinguished from the injunction issued by the Superior Court of Los Angeles County in this case, which enjoined them only from engaging in record and tape piracy in California). Appellant has been jailed for contempt of that Wisconsin injunction (in addition to having been found in contempt of the Superior Court injunction in this case). The Supreme Court of Wisconsin has characterized appellant's record and tape piracy as "larceny", and appellant's admitted record and tape piracy has repeatedly been adjudged to be both civil and criminal violations of the federal Copyright Act.⁵

Commencing in the latter part of 1971, appellant and E-C, without consent or authorization, duplicated recorded performances owned by appellee and other record companies and advertised and sold pirated records and tapes in California and elsewhere.⁶ There is no dispute that appellant and E-C carried on substantial unlawful duplication activities in California and appointed a Los Angeles manufacturer their agent for the manufacture of pirated records embodying recorded performances owned by appellee and others.⁷

⁵*Mercury Record Prods., Inc. v. Economic Consultants, Inc.*, 64 Wis. 2d 163, 218 N.W.2d 705, 714 (1974), appeal dismissed and cert. denied, 420 U.S. 914 (1975); see also *Heilman v. Bell*, 434 F. Supp. 564, 566-67 (E.D. Wis. 1977), motion for TRO and prelim. inj. denied sub nom. in *Heilman v. Levi*, 391 F. Supp. 1106, 1111-13 (E.D. Wis. 1975), appeal docketed, No. 77-1968 (7th Cir. Sept. 26, 1977); *Heilman v. Wolke*, 427 F. Supp. 730 (E.D. Wis. 1977); *E-C Tape Service, Inc. v. Barron*, 71 F.R.D. 585 (E.D. Wis. 1976); *E-C Tapes, Inc. v. Kelly*, 412 F. Supp. 245, 248 (N.D. Ill. 1975). Record and tape piracy also violates several other federal criminal statutes. See *United States v. Taxe*, 540 F.2d 961 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977).

⁶Finding No. 2, Juris. Stmt. Appen. at 30.

⁷Finding No. 26, Juris. Stmt. Appen. at 37.

Appellee brought this action against appellant and E-C in Los Angeles County Superior Court for unfair competition and unjust enrichment, seeking monetary damages for the misappropriation of appellee's product. Appellee also sought, and the trial court granted, a temporary restraining order and later a preliminary injunction enjoining appellant and E-C from, without appellee's consent, duplicating in California recorded performances owned by appellee, and from advertising, offering for sale or selling in California pirated records and tapes embodying recorded performances owned by appellee.

The Superior Court granted summary judgment in favor of appellee on the issue of liability and ordered that the preliminary injunction be made permanent. At the conclusion of a trial to the court on the issue of damages, appellee was awarded compensatory damages of \$80,000.00, punitive damages of \$50,000.00 and costs against appellant and E-C, jointly and severally. E-C did not appeal, and the judgment is now final as to it.

Questions Presented by Appeal.

Appellant does not accurately state the issues before this Court. The questions presented by this appeal are:

1. Does the Supreme Court of the United States have jurisdiction of an appeal pursuant to 28 U.S.C. §1257(2), where the decision of the highest court of the state (by declining to review an intermediate appellate court decision) is based on that court's construction of the common law of that state, and where appellant did not at any time, in either the trial court

or the state's appellate courts, question the validity of any state statute on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, and where the state courts did not at any time determine the validity of any state statute?

2. Do the California courts have the power to hold that record and tape piracy, carried on in California by a defendant over whom California has personal jurisdiction, is unfair competition under the common law of California and to enjoin such record and tape piracy in or aimed at California, even though that defendant engages in record and tape piracy in other states as well?

3. Do the California courts have the power to hold that record and tape piracy, by a defendant over whom California has personal jurisdiction, and who manufactured pirated phonograph records in California, is unfair competition entitling the plaintiff to recover damages resulting from all that defendant's activities and sales, where the defendant has not shown that his operations were legal in any state, and where he has made it impossible to isolate that portion of his activities occurring solely in California?

4. Has appellant properly raised any substantial federal question?

I

This Court Does Not Have Jurisdiction of This Appeal.

Appellant invokes this Court's jurisdiction under 28 U.S.C. §1257(2) which provides in part:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

“....
“(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.”

This Court lacks appellate jurisdiction under 28 U.S.C. §1257(2) because an essential prerequisite to such jurisdiction is lacking here: this case does not in any way involve the validity of a state statute.

A. Appellant Did Not Raise, and the California Courts Did Not Decide, the Validity of Any California Statute.

The decision of the California Court of Appeal is based on that court's interpretation of the common law of California. The California Court of Appeal did no more than rule that appellant committed the common-law tort of unfair competition by misappropriating the intangible property of appellee, thereby entitling appellee to damages and an injunction. The California Court of Appeal simply applied a common-law doctrine enunciated by this Court in *International News Service v. Associated Press*, 248 U.S. 215 (1918), held to be applicable to record and tape piracy in *Capitol Records, Inc. v. Erickson*, 2 Cal. App. 3d 526, 82 Cal. Rptr. 798 (1969), *cert. denied*, 398 U.S. 960 (1970), and applied to record piracy as recently as last month by the Court of Appeals for the Sixth Circuit. See *A & M Records, Inc. v. M.V.C. Distributing Corp.*, No. 76-1843-44, slip op. at 3 (6th Cir. April 7, 1978).⁸

⁸The “misappropriation” doctrine was first applied to record piracy by a federal court the same year that Congress enacted the Copyright Act of 1909. *Fonotipia, Ltd. v. Bradley*, 171 F. 951 (C.C.E.D.N.Y. 1909).

Appellant pirated records which had been fixed prior to February 15, 1972 and which are accordingly protected against piracy under state law. See *Goldstein v. California*, *supra*. Recordings fixed subsequent to February 15, 1972 are protected against piracy by federal law. 17 U.S.C. §§102(a)(7), 106, 114. Piracy of recordings fixed prior to February 15, 1972 is a crime in forty-nine states, including California, and the courts of every state which have decided the issue have held that record and tape piracy is unfair competition.⁹

Appellant's contention that the validity of a state statute is drawn into question wholly ignores the fact that this liability is predicated on his commission of the common-law torts of misappropriation and conversion. The California Court of Appeal plainly based its decision on the common law of the State of California. In its opinion, the court stated that appellant's conduct constituted unfair competition because it was misappropriation.¹⁰ See also Restatement (Second) of Torts, Introductory Note to Chapter 35 (Tent. Draft No. 8, 1963) (recognizing that the law of unfair competition and unfair trade practices derives from the common law).

⁹See Cal. Penal Code §653h; *Capitol Records, Inc. v. Erickson*, 2 Cal. App. 3d 526, 82 Cal. Rptr. 798 (1969), *cert. denied*, 398 U.S. 960 (1970) and statutes and decisions of other states collected in Exhibits 1 and 2 to this motion. In the new Copyright Act, Congress expressly recognized and confirmed the right of the states to protect pre-1972 recordings against piracy until 2047, exempting such recordings from the general rule of federal preemption contained in the new Copyright Act. 17 U.S.C. §301(c).

¹⁰*A & M Records, Inc. v. Heilman*, *supra*, 75 Cal. App. 3d at 564, 142 Cal. Rptr. at 396, Juris. Stmt. Appen. at 11-12.

That California has codified a portion of the common law does not draw any statute into question. The legislature, in enacting Civil Code §3369, carefully chose the phrase "shall mean and include" in defining unfair competition, to indicate that the statutory definition was not intended to be restrictive or exclusive. *Athens Lodge No. 70 v. Wilson*, 117 Cal. App. 2d 322, 325, 255 P.2d 482, 484 (1953). The legislature has left it to the courts "to determine what conduct will constitute unfair competition in a particular case." *Hall v. Wright*, 125 F. Supp. 269, 272 (S.D. Cal. 1954) (applying California law); *Ojala v. Bohlin*, 178 Cal. App. 2d 292, 301, 2 Cal. Rptr. 919, 924 (1960) ("The legal concept of unfair competition has evolved as a broad and flexible doctrine with a capacity for further growth to meet changing conditions, and there is no complete list of the activities which constitute unfair competition."). Such case-by-case adjudication is but the development of the common law; the validity of a statute is not drawn in question thereby.

B. The Cases Cited in the Jurisdictional Statement Do Not Support Appellant's Argument That This Court Has Jurisdiction of This Appeal.

Appellant has cited two cases to support his claim that the judgment of the California Supreme Court is a "legislative act" and that he is accordingly appealing from a decision upholding the validity of a statute: *Lathrop v. Donohue*, 367 U.S. 820 (1961); and *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S.

282 (1921). Appellant also relied on these cases in presenting his prior appeal to this Court.¹¹

Lathrop held that an order of the Wisconsin Supreme Court integrating the Wisconsin bar was to be considered a "statute" for the purpose of 28 U.S.C. §1257(2) because it was legislative in nature, "bore no resemblance to adjudication . . . [and] disposed of no litigation between parties." 367 U.S. at 827. *Dahnke-Walker* involved the validity of a Kentucky statute prescribing conditions to doing business in the State.

The judgment appealed from here, on the other hand, has all the attributes of adjudication and represents the culmination of litigation between parties. The principles, rationales and express holdings of *Lathrop* and *Dahnke-Walker* therefore have no bearing here.

"The common law is constantly and generally used in contradistinction to statute law." *Lessee of Levy v. M'Cartee*, 31 U.S. (6 Pet.) 102, 110 (1832). "It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Lutwak v. United States*, 344 U.S. 604, 615 (1953), quoting from *Funk v. United States*, 290 U.S. 371, 383 (1934); cf. *Ojala v. Bohlin*, *supra*,

¹¹See Jurisdictional Statement at 13, 15, *Economic Consultants, Inc. v. Mercury Record Prods., Inc.*, 420 U.S. 914 (1975). See also pp. 10-11 *infra*. *Market St. R.R. Co. v. Railroad Comm'n*, 324 U.S. 548 (1945), also relied upon by appellant (Juris. Stmt. at 2), deals with finality of a state court's decision, not whether a statute is drawn in question.

ascribing the same attribute of flexibility to California's definition of unfair competition. Acceptance of appellant's argument that the California Court of Appeal's construction of the California common law of unfair competition is "legislation" and sufficient to invoke this Court's appellate jurisdiction under 28 U.S.C. §1257(2), would render the references to state statutes in §1257 meaningless.

II

Even if This Court Has Jurisdiction the Judgment Below Should Be Affirmed Because the Appeal Does Not Present a Substantial Federal Question and Because the Questions Presented Are so Unsubstantial as Not to Need Further Argument.

Every colorable federal question raised by appellant was answered by this Court in *Goldstein v. California*, 412 U.S. 546 (1973), and *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974). There is no reason for reexamination of any of these issues.

This is not the first time appellant has asked this Court to rule that federal law exempts his record and tape piracy from the consequences of state law. In *Mercury Record Productions, Inc. v. Economic Consultants, Inc.*, 64 Wis. 2d 163, 218 N.W.2d 705 (1974), appeal dismissed and cert. denied, 420 U.S. 914 (1975), the Supreme Court of Wisconsin held that record and tape piracy was enjoined unfair competition. The defendants in that action, E-C and appellant herein, appealed to this Court from the decision of the Supreme Court of Wisconsin. In his Jurisdictional

Statement in that appeal, appellant raised substantially the same questions presented here. He asserted that the Wisconsin Supreme Court decision violated the copyright clause by creating "copyright protection for records which were fixed prior to February 15, 1972";¹³ that the decision of the Wisconsin Supreme Court violated the supremacy clause and was contrary to this Court's decision in *Goldstein v. California*, 412 U.S. 546 (1973);¹⁴ that the decision of the Wisconsin Supreme Court violated the commerce clause by prohibiting interstate and international commerce in pirated records and tapes;¹⁵ that the decision of the Wisconsin Supreme Court violated the copyright and supremacy clauses by prohibiting the sale of recordings which had been granted federal compilation copyrights;¹⁶ and that Congress had preempted the field by its passage of the Sound Recording Act, Public Law 92-140, 85 Stat. 391 (1971).¹⁷ This Court dismissed appellant's prior appeal and denied certiorari. *Economic Consultants, Inc. v. Mercury Record Productions, Inc.*, 420 U.S. 914 (1975).

These same issues, raised by appellant in this appeal, are just as unsubstantial now as they were in appellant's prior appeal.

¹³Jurisdictional Statement at 5, *Economic Consultants, Inc. v. Mercury Record Prods., Inc.*, 420 U.S. 914 (1975).

¹⁴*Id.*

¹⁵*Id.* at 6.

¹⁶*Id.*

¹⁷*Id.*

A. The California Court of Appeal's Construction of California Common Law and the Scope of the California Injunction Do Not Present Any Substantial Federal Question.

Exposition of California's common law of unfair competition and, in particular, whether the misappropriation doctrine is a part of that common law, and whether record and tape piracy is tortious, are not within this Court's jurisdiction, but are matters within the exclusive province of the California courts. "[W]hether or not given conduct is tortious is a question of state law" *Fashion Originators' Guild v. Federal Trade Commission*, 312 U.S. 457, 468 (1941). "Under the view . . . of the statutes conferring appellate jurisdiction on this Court, we have no power to revise judgments on questions of state law." *Henry v. Mississippi*, 379 U.S. 443, 446-47 (1965).

Appellant stresses that he engaged in the piracy of appellee's product, not only in California, but throughout the nation. His central thesis is that the scope of his activity insulates him from the application of California law. Apart from the fact that this contention is wholly at odds with *Goldstein v. California*, 412 U.S. 546 (1973),¹⁷ record and tape piracy is illegal everywhere.¹⁸ If it were true, as appellant argues, that California cannot give relief because the

¹⁷See pp. 14, 19 *infra*.

¹⁸Piracy of recordings fixed prior to February 15, 1972 violates the state law rights of the owners of the recordings and the federal law rights of the owners of the copyrights in the musical compositions (tune and lyrics) performed on the recordings. See note 9 *supra* (as to state law); pp. 19-20 *infra* (as to federal law).

scope of appellant's piracy was nationwide, the logical consequence would be that *no* state could grant such relief, even though appellant's conduct is illegal in *every* state. The absurdity of such a result is apparent. The federal structure was never intended to be a shield for illegal activity.

Moreover, appellant consented to the jurisdiction of the California courts by making a general appearance.¹⁹ Even in the absence of appellant's consent, the California courts had jurisdiction because appellant conducted a substantial portion of his manufacturing and labeling operations in California, and offered for sale and sold his pirated records and tapes in California.

Having acquired personal jurisdiction over appellant, the California courts were empowered to grant appellee the relief which it sought. The trial court issued an injunction narrowly circumscribed to appellant's activities in, or aimed at, California. The power of a court having personal jurisdiction over a defendant to grant compensatory relief for all damages caused by the conduct of that defendant, not merely those occurring within its own border, is clear and unquestioned, Restatement (Second) of Conflict of Laws §53 (1971), and has been recognized by this Court. *New York v. O'Neill*, 359 U.S. 1, 8-9 (1959); see also *California Prune & Apricot Association v. H.R. Nicholson Co.*, 69 Cal. App. 2d 207, 224-25, 158 P.2d 764, 773 (1945).

¹⁹See, e.g., Clerk's Transcript at 115 (minute order showing appearance in opposition to OSC re preliminary injunction), 170-85 (answer to first amended complaint).

The courts have consistently awarded plaintiffs all damages resulting from defendants' unfair competition based on all sales and have not limited damages to a specific state or geographic area.²⁰ Any other rule would require that a person wronged by unfair competition must institute multiple actions in every jurisdiction and prove sales which took place solely within each particular state.

Nothing in *Goldstein v. California*, 412 U.S. 546 (1973), precludes affording complete relief in one action. *Goldstein* holds that each state may, without violating the Constitution, outlaw record and tape piracy. In the absence of proof to the contrary, California presumes foreign law to be the same as its own. *Gagnon Co. v. Nevada Desert Inn, Inc.*, 45 Cal. 2d 448, 454, 289 P.2d 466, 471 (1955). Defendants did not—and cannot—identify any state in which record and tape piracy is legal. In fact, appellant's record and tape piracy was illegal in California, the forum state, in Wisconsin, appellant's domicile, and in Illinois, where appellant relocated his piracy operation in defiance of existing Illinois law.²¹

Appellant asserts that the trial court should have placed the burden of proving E-C's California sales

²⁰See, e.g., *Gai Audio v. Columbia Broadcasting Systems, Inc.*, 27 Md. App. 172, 340 A.2d 736, 752 (Ct. Spec. App. 1975) (tape piracy); *Brown v. Republic Prods., Inc.*, 26 Cal. 2d 867, 868, 161 P.2d 796, 797 (1945) (accounting for profit for use of musical composition); *American Philatelic Soc'y v. Clairbourne*, 3 Cal. 2d 689, 692, 46 P.2d 135, 137 (1935) (national sale of fraudulently perforated stamps).

²¹*Mercury Record Prods., Inc. v. Economic Consultants, Inc.*, 64 Wis. 2d 163, 218 N.W.2d 705, 712 (1974), appeal dismissed and cert. denied, 420 U.S. 914 (1975); *Capitol Records, Inc. v. Spies*, 130 Ill. App. 2d 429, 264 N.E.2d 874 (1970). Forty-nine states have made piracy of recordings a crime. See Exhibits 1 and 2, annexed hereto.

on appellee.²² Rules allocating the burden of proof in civil cases are matters of local law, not federal questions cognizable before this Court. *Lavine v. Milne*, 424 U.S. 577, 585 (1976). The decision of the California Court of Appeal, affirming the allocation of the burden of proof by the trial court, is conclusive.

No federal question is raised by appellant's challenge to the calculation of damages.²³ In substance, appellant contends that were this a federal copyright infringement case, he would have been entitled to deduct his costs incurred in connection with his piracy operations. The obvious and simple answer is that this was not a federal copyright infringement case. Rather, liability was imposed because appellant engaged in common-law unfair competition.

Appellant was not permitted to deduct his costs for two reasons, both founded solely in state law, and neither of which raises any federal question. First, the basis of his liability was that he misappropriated and sold appellee's property. Under California law, one who misappropriates the property of another is not entitled to deduct any of the costs of the transaction by which he accomplishes his wrongful conduct. *Ward v. Taggart*, 51 Cal. 2d 736, 744, 336 P.2d 534, 539 (1959); see also Cal. Civ. Code §2224; *Church v. Bailey*, 90 Cal. App. 2d 501, 504, 203 P.2d 547,

²²Juris. Stmt. at 10-11. Appellant asserts that the trial court "suddenly" foisted this burden upon him during final argument. *Id.* However, prior to the conclusion of appellee's case in chief, the trial court adverted to this problem. Reporter's Transcript at 494-95. Having been thus forewarned, appellant bears the sole blame for his failure to develop this alleged defense.

²³Juris. Stmt. at 18. Appellant's contention that federal copyright law governs the calculation of damages in a state common-law unfair competition case was not raised below.

549 (1949) (imposing constructive trust on proceeds of sale of another's property). Second, the trial court found that due to appellant's inaccurate and incomplete books it was impossible to verify those alleged expenses.²⁴

B. The Decision of the California Court of Appeal Is in Accord With Decisions of This Court.

The decision of the California Court of Appeal, enjoining appellant's record and tape piracy in or aimed at California as unlawful, unfair competition and awarding damages for such conduct, is squarely sanctioned by *Goldstein v. California*, 412 U.S. 546 (1973) and *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974). In *Kewanee*, this Court expressly recognized that commercial theft threatens "the basic decency of society" and that "the state interest in denying profit to such illegal ventures is unchallengeable." 416 U.S. at 487.

Appellant's contention, that the state court has created a "national copyright", is flatly contradicted by the language of the permanent injunction. That injunction is carefully circumscribed to activities in, or aimed at, California.²⁵

Appellant's claim that he has copyrighted his pirated compilations²⁶ attempts to raise a spurious issue. The issue here is the right of appellant to make his compilations by pirating other recordings. The issue is not whether appellant's pirated compilations are sub-

²⁴*A & M Records, Inc. v. Heilman*, *supra*, 75 Cal. App. 3d at 570, n.11, 142 Cal. Rptr. at 400, Juris. Stmt. Appen. at 20.

²⁵See Judgment, Juris. Stmt. Appen. at 25-26.

²⁶Juris. Stmt. at 21.

ject to copyright or have been or can be copied by others.

C. Appellant's Argument That the Commerce Clause Precludes California From Enjoining Appellant's Conduct in or Aimed at California Raises No Substantial Federal Question.

Appellant asserts that the injunction violates the commerce clause by allegedly interfering with the national advertising of defendants.²⁷ However, all injunctive relief is limited to California. In any event, there is no *lawful* commerce, interstate or intrastate, in pirated records and tapes. *The simple fact is that an injunction against the advertisement or sale of such contraband in no way contravenes the Commerce Clause or Copyright Clause any more than would an injunction against the advertising and sale of heroin.*

Other decisions of this Court interpreting the Commerce Clause strongly support the right of California to outlaw deleterious business practices such as record and tape piracy.

In *California v. Zook*, 336 U.S. 725 (1949), this Court upheld a California statute which prohibited the arrangement of transportation over the public highways of California if the transporting carrier had no permit from the Interstate Commerce Commission. The Federal Motor Carrier Act has substantially the same provision. 336 U.S. at 726-27. This Court rejected arguments that the California statute was invalid under the Commerce Clause and held that the fact that a state law may be identical to a federal statute does not "automatically" render the state law invalid. 336 U.S. at 732.

²⁷Juris. Stmt. at 19.

In *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960), this Court upheld against an attack based on the Commerce Clause certain smoke abatement ordinances of the city of Detroit which had been applied to ships traveling in interstate commerce, stating that the "teaching of this Court's decisions . . . enjoin seeking out conflicts between state and federal regulation where none clearly exists." 362 U.S. at 446.

In *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424 (1963), this Court upheld a New Mexico law which had been applied to prohibit advertising which Texas optometrists had placed in a newspaper and radio station located in New Mexico, but most of whose readers and listeners were located in Texas. This Court held that "a state law may not be struck down on the mere showing that its administration affects interstate commerce in some way" and that the New Mexico legislation in question did not impinge "upon an area of interstate commerce which by its nature requires uniformity of regulation." 374 U.S. at 429. In *Goldstein*, this Court squarely held that the prohibition of the piracy of pre-1972 recordings does not require "uniformity of regulation". Since the result in *Head* was to permit New Mexico to prevent Texas residents from hearing advertisements about a Texas business, which advertisements were lawful in Texas, *a fortiori* California can enjoin appellant's advertisements for his record and tape piracy—which are unlawful *everywhere*—insofar as those advertisements are aimed at the State of California. Moreover, this case involves stolen property—pirated sound recordings—which, like contaminated or unfit produce, is "not the legitimate subject of trade or commerce, nor within the protection of the commerce clause of

the Constitution". *Sligh v. Kirkwood*, 237 U.S. 52, 60 (1915), quoted and cited with approval in *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 143-44 (1970).

D. Appellant's Claim That His Record and Tape Piracy Is Protected by the Compulsory License Provisions of the Copyright Act Is Frivolous.

Appellant contends that the "compulsory license provisions" of former 17 U.S.C. §1(e) protect his record and tape piracy.²⁸ The argument is without merit. In *Goldstein v. California*, *supra*, this Court rejected this argument, 412 U.S. at 566 & n.23. Four Courts of Appeals have held that record and tape pirates do not have the right to invoke the compulsory license provisions of the Copyright Act, and in each case, this Court declined to review the decision. *Duchess Music Corp. v. Stern*, 458 F.2d 1305 (9th Cir.), *cert. denied*, 409 U.S. 847 (1972); *Jondora Music Publishing Co. v. Melody Recordings, Inc.*, 506 F.2d 392 (3d Cir.), *cert. denied*, 421 U.S. 1012 (1975); *Fame Publishing Co. v. Alabama Custom Tape, Inc.*, 507 F.2d 667 (5th Cir.), *cert. denied*, 423 U.S. 841 (1975); *Edward B. Marks Music Corp. v. Colorado Magnetics, Inc.*, 497 F.2d 285 (10th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975). In *Colorado Magnetics*, *supra*, this Court invited the United States to submit a brief *amicus curiae* addressing the contention that the compulsory license laws were available to record and tape pirates. The Solicitor General's brief, filed in December, 1974, cogently analyzed the reasons why it was contrary to law and policy to permit such pirates to rely on former §1(e). Thereafter, this Court *denied certiorari*.

²⁸Juris. Stmt. at 20-21.

Moreover, appellant has himself previously litigated this issue. There have been *three* determinations holding that appellant's record and tape piracy is in violation of federal law and that appellant has no rights under the compulsory license provisions of the Copyright Act. *Heilman v. Bell*, 434 F. Supp. 564, 566-67 (E.D. Wis. 1977);²⁹ *E-C Tapes, Inc. v. Kelly*, 412 F. Supp. 245, 248 (N.D. Ill. 1975); *Heilman v. Levi*, 391 F. Supp. 1106, 1111 (E.D. Wis. 1975).³⁰

E. Appellant's First Amendment Claim Is Frivolous.

The First Amendment does not curtail the states' power to prevent the solicitation of unlawful transactions, such as sales of pirated records and tapes. In *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), a newspaper asserted a First Amendment right to print job advertisements in sex-designated column headings in violation of a local ordinance. This Court had little difficulty in rejecting that proposition:

"Discrimination in employment is not only commercial activity, it is *illegal* commercial activity under the Ordinance. We have no doubt that a newspaper constitutionally could be forbidden to publish a want ad proposing a sale of narcotics or soliciting prostitutes." *Id.* at 388 (footnotes omitted).

²⁹Appeal docketed, No. 77-1968 (7th Cir. Sept. 26, 1977).

³⁰Appeal docketed, No. 77-1968 (7th Cir. Sept. 26, 1977).

This Court's subsequent recognition of First Amendment rights in commercial speech³¹ in no way impairs the vitality of *Pittsburgh Press*. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-72 (1976), and again in *Carey v. Population Services International*, 431 U.S. 678, 700-02 (1977), this Court explicitly reaffirmed the power of the states to regulate commercial speech and in particular advertisements which propose illegal transactions.³²

F. Appellant's Other Claims Raise No Substantial Federal Question.

None of the remaining arguments set forth in the Jurisdictional Statement present federal questions properly raised in the proceedings below. In the California Court of Appeal, appellant asserted that the trial court committed an abuse of discretion by precluding appellant from testifying at trial.³³ Now, for the first time, he makes the different claim that the order precluding him from testifying violated his Fourteenth Amendment rights.³⁴ Since the claim was not raised below, appellant cannot make the claim here.³⁵ In any event, appellant's

³¹See, e.g., *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975).

³²The cases relied upon by appellant are inapposite since neither involved the solicitation of illegal transactions.

³³Appellant's Opening Brief at 27, *A & M Records, Inc. v. Heilman*, *supra*.

³⁴Juris. Stmt. at 22-23.

³⁵As the California Court of Appeal noted in its decision, "[A]ppellant does not claim that the trial court's order was (This footnote is continued on next page)

claim is contrary to federal law. See *International Telephone & Telegraph Corp. v. United Telephone Company of Florida*, 60 F.R.D. 177, 186 (M.D. Fla. 1973); *Securities & Exchange Commission v. American Beryllium & Oil Corp.*, 303 F. Supp. 912, 921 (S.D.N.Y. 1969).

No federal question is raised with respect to the denial of Thomas Kells' application to be admitted as counsel pro hac vice for the corporate defendant, E-C, which never appealed. The constitutional claim is being presented for the first time in this Court, since appellant previously argued only that the ruling was an abuse of discretion.⁸⁶ Moreover, the only reference in the record to that motion is the trial court's statement that it was denied. It is appellant's duty to show that there is error and that he raised the error at all levels. He has failed to make such a showing. In any event, appellant lacks standing to assert the rights of E-C, which is not a party to this appeal. He is *not* asserting his own rights, because his liability was not predicated on an alter ego theory, but rather because of his personal participation in E-C's operations.⁸⁷

an inappropriate 'juristic consequence' of his assertion in discovery of his constitutional privilege against self-incrimination. [Citing *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1975)]." *A & M Records, Inc. v. Heilman*, *supra*, 75 Cal. App. 3d at 566, 142 Cal. Rptr. at 398, Juris. Stmt. Appen. at 15.

⁸⁶Appellant's Opening Brief at 28, *A & M Records, Inc. v. Heilman*, *supra*.

⁸⁷See Order Granting Summary Judgment on Liability and Specifying Issues Without Substantial Controversy on the Complaint, ¶¶6, 14, 16, 18, Juris. Stmt. Appen. at 45-46.

Appellant asserts, also for the first time, that the admission into evidence of facts regarding other actions pending against him denied him due process.⁸⁸ In the California Court of Appeal, he asserted only that such evidence had no relevance to this case.⁸⁹ His failure to raise this "issue" below precludes asserting it here. In any event, his claim is specious. Evidence of appellant's conduct in other states and of other cases pending against him relating to his record and tape piracy was clearly relevant to the issue of punitive damages. Such evidence demonstrated the need for an effective deterrent and also suggested an ability to pay a sizeable damage award.

Moreover, this Court cannot consider the claim that punitive damages are excessive because appellant failed properly to press that claim in the California courts by failing to raise the issue by a motion for a new trial. *A & M Records, Inc. v. Heilman*, *supra*, 75 Cal. App. 3d at 569, n.10, 142 Cal. Rptr. at 400, Juris. Stmt. Appen. at 19; see also *Topanga Corp. v. Gentile*, 1 Cal. App. 3d 572, 577, 81 Cal. Rptr. 863, 865-66 (1969).

⁸⁸Juris. Stmt. at 23.

⁸⁹Appellant's Opening Brief at 34, *A & M Records, Inc. v. Heilman*, *supra*.

III

Appellant Has Failed to Comply With the Rules of This Court, in That He Has Not Shown the Manner in Which He Raised in the California Courts the Questions Presented by This Appeal. Moreover, Appellant Never Raised in the California Courts Most of the Questions He Asks This Court to Consider.

Rule 15(1)(d) of the Revised Rules of the Supreme Court of the United States provides in part:

" . . . If the appeal is from a state court, the statement of the case shall also specify the stage in the proceedings in the court of the first instance, and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them . . . ; and the way in which they were passed upon by the court; with such pertinent quotations of specific portions of the record, or summary thereof, with a specific reference to the places in the record where the matter appears . . . as will support the assertion that the rulings of the court were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court."

Appellant has not complied with any of the foregoing requirements. He has not specified when and in what manner he raised the alleged "federal questions"; nor has he described the manner in which those issues were passed upon. Non-compliance with the requirements of the Rules of the Supreme Court of the United States is, by itself, a basis for dismissing the appeal. *See Revised Rules of the Supreme Court of the United States, Rule 16(a).*

The reason for appellant's failure to comply with this Court's rules is simple: he failed properly to raise in the California courts almost all of the supposed questions he seeks to raise in this Court.

IV

There Are No Grounds for Treating the Jurisdictional Statement as a Petition for Writ of Certiorari.

28 U.S.C. §2103 (1970) requires this Court to treat the Jurisdictional Statement as a petition for writ of certiorari if it appears that appellant has "improvidently" invoked this Court's appellate jurisdiction. But there are no "special and important reasons" for this Court to hear this case. Rule 19, Revised Rules of the Supreme Court of the United States. Accordingly, there is no reason for this Court to grant certiorari.

Conclusion.

This appeal raises only settled questions of law and factual conflicts which were resolved by the California courts and is frivolous.

For all of the reasons stated in this motion, appellee respectfully urges that this Court dismiss this appeal, or in the alternative, that it affirm the decision of the California Court of Appeal.

Respectfully submitted,

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A & M Records, Inc.

Of Counsel:

MITCHELL, SILBERBERG & KNUPP,
RUSSELL J. FRACKMAN,
DAVID S. GUBMAN.

EXHIBIT 1.

Statutes Proscribing Record and Tape Piracy.*

*Amendments have been made to some of these statutes, the text of which are not available to counsel. Additionally, Wyoming has just enacted a similar statute, the text of which is not available to counsel.

STATE	EFFECTIVE DATE	TYPE OF OFFENSE	PENALTIES IMPOSED	SCOPE OF COVERAGE
ALABAMA Act 1063, Laws of 1975	November 3, 1975	Felony—Manufacture and/or distribution/ Misdemeanor—Retail Sales	Felony—1st offense—Fine of not more than \$25,000 and/or 1-3 years imprison- ment; 2nd and subsequent offenses—Fine of not more than \$50,000 and/or 3-10 years imprisonment. Misdemeanor—unclassified.	Felony—Unlawful to know- ingly transfer or cause to be transferred, without the owner's consent, recorded sounds with the intent to sell same or use for profit through public performance. Also illegal to manufacture, distribute or wholesale any article with knowledge that sounds thereon are unlaw- fully transferred. Misd- meanor—Unlawful to retail or possess for purposes of retail any recording unlaw- fully manufactured or distributed.
ALASKA AS 43.31.010	July 3, 1975	Misdemeanor	A fine of not more than \$1,000, imprisonment for a period of not more than one year and confiscation of the unlawful stock.	Unlawful to reproduce, sell, offer for sale or ad- vertise for sale any sound recording, reproduced without the owner's con- sent. Also illegal to ad- vertise, offer for sale or sell a recording not bearing the name and address of the manufacturer and the name of the actual artist or group.
ARIZONA 13 A.R.S. 1024	August 15, 1972	Misdemeanor	Fine of not more than \$300 and/or imprison- ment of not more than 6 months.	Unlawful to knowingly manufacture, distribute or retail a recording whose sounds are transferred with- out the owner's consent.
ARKANSAS 41 Ark. Stats. 2368-2372	February 12, 1971	Misdemeanor	Fine of not less than \$50 nor more than \$250.	Same as the above.
CALIFORNIA Penal Code 653H	November 13, 1968 Amended September 30, 1975	Felony/Misdemeanor	1st offense—Fine of up to \$25,000 and/or up to one year in county jail or up to one year and a day in state prison. 2nd offense—fine of up to \$50,000 and/or imprisonment for up to two years.	Same as the above and also illegal to transport such recordings within the state.
COLORADO Title 18 Article 4, Part 6	July 1, 1976	Felony (manufacture) Misdemeanor	Felony—Fine of not less than \$1,000 nor more than \$15,000 and/or imprison- ment for not less than one year nor more than five years. Misdemeanor—Fine of not less than \$50 nor more than \$750 and/or imprisonment for not more than six months.	Unlawful to knowingly transfer without the owner's consent, recorded sounds with the intent to sell same; unlawful to knowingly or with reason- able grounds to know, ad- vertise, offer or possess for sale, or sell any such sound recording. Also unlawful to sell a recording not bear- ing the name and address of the manufacturer and the name of the actual artist or group.
CONNECTICUT Gen. Stat. Ann. 54-41 s	October 11, 1974	Misdemeanor Felony (Class D)	Fine of not more than \$1,000 and/or imprison- ment for not more than one year. Subsequent of- fense—Fine of up to \$2,000 and/or not more than one year imprison- ment.	Unlawful to knowingly manufacture, distribute, sell or advertise for sale a recording whose sounds have been transferred with- out the owner's consent. Unlawful to rent or make available equipment for such transfers.
DELAWARE Sub 3 Chapter V Title 2 Delaware Code	July 22, 1976	Felony—manufacture Misdemeanor—dealing in unauthorized dup- lications (A) or mis- labeled recordings (c)	Felony—Fine of up to \$10,000 and/or up to 7 years imprisonment. Fine of up to \$10,000 plus proven damages for cor- porations. Misdemeanor(A) —Up to 2 years imprison- ment and/or a fine of up to \$1,000 for individuals or \$2,000 for corporations. Misdemeanor (c)—Up to 3 months imprisonment and/ or a fine of up to \$500 for individuals or \$2,000 for corporations.	Unlawful to knowingly transfer or cause to be transferred, without the owner's consent, recorded sounds with the intent to sell same; unlawful to knowingly or with reason- able grounds to know, ad- vertise, offer or possess for sale, or sell any such sound recording. Also unlawful to sell a recording not bear- ing the name and address of the manufacturer and the name of the actual artist or group.
FLORIDA F.S.A. 543.041	October 1, 1971	Misdemeanor	Fine of not more than \$500 or imprisonment of not more than 60 days.	Unlawful to knowingly manufacture, distribute, sell or advertise for sale a recording whose sounds have been transferred with- out the owner's consent. Unlawful to rent or make available equipment for such transfers.

STATE	EFFECTIVE DATE	TYPE OF OFFENSE	PENALTIES IMPOSED	SCOPE OF COVERAGE
GEORGIA Cr. Code 26-9938a	February 28, 1975	Felony	1st offense—Fine of not more than \$25,000. 2nd offense—Fine of not more than \$100,000 and/or imprisonment for not less than one or more than three years.	Unlawful to knowingly manufacture, distribute, sell or offer for sale a recording whose sounds are transferred without the owner's consent and/or which does not bear the name and address of the transferor of the sounds.
HAWAII Act 81 Laws of 1975	May 13, 1975	Misdemeanor		Unlawful to manufacture for profit a sound recording whose sounds are transferred without the owner's consent. Unlawful to knowingly sell or advertise such recordings or to make equipment available for their manufacture.
IDAHO HB 403 Chapter 76, Title 18 Iowa Code	July 1, 1976	Felony (Manufacture)/ Misdemeanor	Felony—Fine of not more than \$10,000 and/or imprisonment for up to 4 years; Misdemeanor—fine of not more than \$1,000 and/or imprisonment for up to six months. In addition all infringing articles and the equipment used to make them are subject to confiscation and destruction.	Unlawful to knowingly transfer without the owner's consent, recorded sounds with the intent to sell same; unlawful to knowingly, or with reasonable grounds to know, advertise, offer or possess for sale, or sell any such sound recording. Also unlawful to sell a recording not bearing the name and address of the manufacturer and the name of the actual artist or group.
ILLINOIS 38 Ill. Rev. Stat. 16-7 & 8 and 38 Ill. Rev. Stat. 43-1 & 2	August 14, 1975	Class 4 Felony/ Class B Misdemeanor	Felony—Fine of not more than \$10,000 and/or 1-3 years imprisonment. Confiscation and destruction of pirated recordings. Misdemeanor—Fine of not more than \$500 and/or imprisonment for not more than six months. Confiscation and destruction of pirated recordings.	Felony to knowingly manufacture, sell, offer for sale or advertise for sale recordings reproduced without the consent of the owner of the master recording or rent the master recording or rent or make available equipment for such manufacture. Misdemeanor to manufacture, sell or otherwise deal in unidentified sound recordings (those recordings which do not provide the actual name and address of the manufacturer and the name of the performer on a prominent place on the label and outside cover or jacket.)
INDIANA I.C. 1971 35-17 Chapter 7	July 1, 1974	Misdemeanor/Felony	1st offense up to \$2,000 and/or up to 1 year imprisonment. Subsequent offense—Fine up to \$5,000 and/or 1-10 years imprisonment.	Unlawful to knowingly manufacture, distribute or retail a recording whose sounds are transferred without the owner's consent.
IOWA Senate file 309 Laws of 1975 (Will be part of Chapter 73 Iowa Code)	July 1, 1975	Misdemeanor	Fine of not more than \$500 and/or imprisonment for not more than one year.	Same as the above and unlawful to knowingly sell or distribute recordings not bearing the name and address of the transferor of sounds.
KANSAS S.B. 855	July 1, 1976	Class E Felony (manufacturing) Class A Misdemeanor (selling and improper labeling)	For manufacturing—imprisonment for not less than one year nor more than five years and/or a fine of not more than \$5,000. For selling or improper labeling not more than one year and/or a fine of up to \$2500.	Unlawful to knowingly duplicate without the consent of the owner, recorded sounds with intent to sell same; unlawful to knowingly, or with reasonable grounds to know, offer for sale or distribution, or possess for such purpose any such sound recordings; unlawful to sell, offer for sale, or possess for such purpose, a recording not bearing the name and address of the manufacturer and the name of the actual artist or group.
KENTUCKY KRS. 434-445	June 20, 1974	Misdemeanor	Fine of up to \$1,000 or double the amount of gain from the commission of the offense, whichever is greater, or imprisonment for up to 60 days, and fine of up to \$1,000, and police may confiscate recordings produced in violation of this act.	Unlawful to knowingly manufacture, distribute or retail a recording whose sounds are transferred without the owner's consent; also unlawful to knowingly sell or distribute recordings not bearing the name and address of the transferor of sounds.
LOUISIANA LRS 14:223	January 1, 1973	Misdemeanor	1st offense—up to \$1,000 Subsequent offense—up to \$2,000.	Unlawful to knowingly manufacture, distribute or retail a recording whose sounds are transferred without the owner's consent.

STATE	EFFECTIVE DATE	TYPE OF OFFENSE	PENALTIES IMPOSED	SCOPE OF COVERAGE
MAINE 10 MRSA 204	November, 1975	Misdemeanor	Manufacture—Fine of not less than \$500 nor more than \$5,000; Advertising or sale—Fine of not less than \$50 nor more than \$500.	Unlawful to knowingly and willfully manufacture a sound recording whose sounds are transferred without the owner's consent. Unlawful to knowingly sell, offer for sale or advertise such a sound recording.
MARYLAND 27 MAC 467A	July 1, 1973	Misdemeanor	1st offense—up to \$2,500 and/or up to 1 year's imprisonment. Subsequent offense—up to \$10,000 fine and/or up to 3 years imprisonment.	Unlawful to knowingly manufacture, distribute or sell recordings whose sounds are transferred without the owner's consent, and it is also unlawful to knowingly distribute, or retail any sound recording which does not bear the actual name and street address of the transferor of sound.
MASSACHUSETTS ALM 266:143	October 31, 1973	Misdemeanor	Fine of not more than \$5,000 or imprisonment for not more than 1 year.	Unlawful to knowingly manufacture, distribute or sell recordings whose sounds are transferred without the owner's consent.
MICHIGAN HB 4620	November 18, 1975	Misdemeanor	Manufacture—Imprisonment for not more than one year, or a fine of not more than \$5,000, or both. Sale—Fine of not more than \$100 for each offense.	Unlawful to knowingly manufacture, advertise, sell, resell, offer for sale or resale, or possess for the purpose of sale or resale recordings without the consent of the owner of the sounds.
MINNESOTA MSA 325.841-844	August 1, 1973	Felony	1st offense—up to \$25,000 Subsequent offense—up to \$100,000 fine and/or imprisonment of not more than 3 years.	Unlawful to knowingly manufacture, distribute or sell recordings whose sounds are transferred without the owner's consent.
MISSISSIPPI Senate Bill 2105	July 1, 1974	Misdemeanor	1st offense—up to \$100 fine and/or up to 30 days imprisonment; subsequent offenses—up to \$500 fine and/or 6 months imprisonment.	Unlawful to knowingly manufacture, distribute, retail or advertise a recording whose sounds are transferred without the owner's consent. Also unlawful to knowingly manufacture, distribute or sell recordings not bearing the actual name and street address of the transferor as well as the name of the actual performer.
NEBRASKA R.S. Supp. (1974) 28-1601 thru 28-1604	July 12, 1974	Misdemeanor	Fine of up to \$1,000 and/or 6 months imprisonment.	Unlawful to knowingly manufacture, distribute, sell, offer or possess for sale a recording whose sounds are transferred without the owner's consent. Also unlawful to sell, offer or possess for sale a recording not bearing the name and address of the transferor of sounds.
NEVADA N.R.S. 205.217	July 1, 1973	Felony	1st offense—Fine of not more than \$5,000 and/or imprisonment for not less than 1 year nor more than 6 years. Subsequent offense—fine of not more than \$5,000 and/or imprisonment for not less than 1 year nor more than 10 years.	Same as the above.
NEW HAMPSHIRE N.H.R.S.A. 352-A: 1-4 (Supp.)	November 1, 1973	Prohibited Conduct	Owner of recorded device has cause of action for treble compensatory damages and/or injunctive relief.	Prohibited to knowingly manufacture, distribute, or retail a recording whose sounds are transferred without the owner's consent and/or which does not bear the manufacturer's name and address.
NEW JERSEY A.B. 1916 signed 1/8/76	January 8, 1976	High misdemeanor—manufacture/misdemeanor—sales.	High misdemeanor—A fine of not more than \$2,000 and imprisonment for not more than seven years. Misdemeanor—A fine of not more than \$1,000 and up to three years imprisonment.	Unlawful to knowingly manufacture, cause to be manufactured, sell, offer for sale or advertise a recording whose sounds are transferred without the owner's consent.
NEW MEXICO 40A N.M.S.A. 16-41 thru 16-45	May 15, 1974 as amended by Laws of 1975 Chapter 335	Misdemeanor/ Felony	Felony for manufacturers and distributors up to \$5,000 and/or 1 year imprisonment. Misdemeanor for retailers.	Same as the above.

STATE	EFFECTIVE DATE	TYPE OF OFFENSE	PENALTIES IMPOSED	SCOPE OF COVERAGE
NEW YORK G.B.L. 560-561	September 1, 1967	Misdemeanor	Fine of not more than \$100 and/or imprisonment of up to one year.	Unlawful to knowingly manufacture or sell a recording whose sounds are transferred without the owner's consent; also illegal to manufacture or sell sound recordings without the manufacturer's name and address.
NORTH CAROLINA Chapter 14, General Statutes Article 56A	January 1, 1975	Misdemeanor	Fine of up to \$500 and/or imprisonment of up to 6 months.	Unlawful to knowingly manufacture, distribute or sell unauthorized duplications of sound recordings or to record live concerts without permission. Unlawful to manufacture, distribute or sell recordings not bearing the true name of the manufacturer.
OHIO ORC 2913.32	January 1, 1974	Felony	Imprisonment for not less than six months nor more than five years and a fine of not more than \$2,500.	Unlawful to "knowingly" . . . practice deception in . . . reproducing any . . . phonograph record, or recording tape." Also unlawful to utter or possess with purpose to utter any recording deceptively simulated.
ORC 1333.52	May 10, 1976	Misdemeanor	Manufacture—not more than six months imprisonment and/or a maximum fine of \$1,000. Sale of unauthorized duplication or violation of labeling provisions not more than 90 days imprisonment and/or a maximum fine of \$750.	Unlawful to duplicate for sale any sound recording without the consent of the owner of that recording; unlawful to knowingly sell, advertise or offer to sell such a recording. Also unlawful to manufacture or sell a sound recording not bearing the name of the artists and the name and address of the manufacturer.
OKLAHOMA 21 O.S. Supp (1975) 1965-1969	September 1, 1975	Misdemeanor/ Felony	1st offense—manufacture—up to \$500. 2nd offense—manufacture—up to \$25,000 and/or 2 years imprisonment. Fine of up to \$500 for sale.	Unlawful to knowingly reproduce for sale without the owner's consent, sound recordings less than 20 years old. Unlawful to sell such recordings.
OREGON Chapter 747 Laws of 1973	October 5, 1973	Misdemeanor	Fine not to exceed \$500 and/or imprisonment for not more than 6 months.	Unlawful to knowingly manufacture, distribute or retail or advertise for sale any sound recording which is duplicated without the consent of the owner of the original master recording.
PENNSYLVANIA 18 P.S.A. 4116	October 18, 1971	Misdemeanor—to knowingly retail or possess for purpose of retailing. Felony—to knowingly manufacture, distribute or wholesale sound recordings duplicated without the consent of the owner.	Confiscation of pirated recordings and: 1st offense—fine of not more than \$5,000 or imprisonment of not more than 3 years. Subsequent offense—fine of not more than \$20,000 and/or imprisonment of not more than 10 years.	Unlawful to knowingly manufacture, distribute or retail a recording whose sounds are transferred without the owner's consent and/or which does not bear the true name of the manufacturer.
RHODE ISLAND G.L. 6-13.1-15 Deceptive Trade Practices (Chapter 257, Laws of 1976)	June 9, 1976	Felony	1st offense—Fine of not more than \$5,000 and/or imprisonment for not more than six years. Subsequent offense—Fine of not more than \$5,000 and/or imprisonment for not more than 10 years.	Unlawful to knowingly transfer sounds and to sell, distribute, offer, or possess, for sale or distribution, any article onto which sounds have been transferred without the consent of the owner of those sounds. Also: illegal to sell or distribute, offer, or possess, for sale or distribution, a sound recording not bearing the actual name and address of the transferor of sounds on its outside face.
SOUTH CAROLINA 1975 Calendar No. S. 249	January 1, 1976	Misdemeanor	1st offense—Manufacture—fine of up to \$5,000 and/or imprisonment for 6 months to 2 years; subsequent offense—fine of up to \$10,000 and/or imprisonment for 3-5 years. Advertisement or sale—fine of up to \$1,000 and/or imprisonment for up to 1 year.	Unlawful to knowingly manufacture, distribute, sell, cause to be sold, advertise or use for profit through public performance a recording whose sounds are transferred without the owner's consent; unlawful to rent or make available equipment for such transfer.

STATE	EFFECTIVE DATE	TYPE OF OFFENSE	PENALTIES IMPOSED	SCOPE OF COVERAGE
SOUTH DAKOTA 13 S.D. Compiled Laws 43-43A	July 1, 1975	Misdemeanor—to retail/Felony—to manufacture or distribute.	Retailer—fine of not more than \$500 and/or not more than 6 months imprisonment. All others—a fine of not more than \$1,000 and/or not more than 3 years imprisonment.	Unlawful to knowingly manufacture, distribute, sell or offer for sale a recording whose sounds are transferred without the owner's consent and/or which does not bear the name and address of the transferor or the sounds and the name(s) of the artist(s). Also unlawful to use such recordings for profit through public performance.
TENNESSEE 7 Tenn. Ann. Code 39-4244 thru 39-4250	July 1, 1971	Misdemeanor—to knowingly retail or possess for purpose of retailing. Felony—to manufacture, distribute or wholesale sound recordings duplicated without the consent of the owner.	Confiscation of pirated recordings and: 1st offense—fine of not more than \$25,000 and/or imprisonment of not less than 1 year nor more than 3 years. Subsequent offense—fine of not more than \$100,000 and/or imprisonment of not less than 3 years, nor more than 10 years.	Unlawful to knowingly manufacture, distribute, retail or use for profit through public performance recordings whose sounds are transferred without the owner's consent, and/or which does not bear the name of manufacturer.
TEXAS Vernon's Ann. Civ. Stat. Art. 9012	August 30, 1971	Misdemeanor/Felony	1st offense—fine of not more than \$2,000. 2nd offense—fine of not more than \$25,000 and/or imprisonment for not more than 5 years.	Unlawful to knowingly reproduce for sale, to sell or offer for sale a sound recording whose sounds are transferred without the owner's consent.
UTAH Unauthorized Recording Practices Act of 1973	May 8, 1973	Misdemeanor	Fine not to exceed \$299 and/or imprisonment up to 6 months.	Same as above, as well as to rent or make available equipment for such transfers.
VIRGINIA 59.1 Code of Va. 41.1-41.6	July 1, 1972	Misdemeanor	Fine not to exceed \$500 and/or imprisonment up to 1 year.	Unlawful to knowingly manufacture, distribute or retail a recording whose sounds are transferred without consent of the owner and/or does not bear the name of the manufacturer.
WASHINGTON 19 R.C.W. 25.020-25.040	July 25, 1974	Misdemeanor	Fine not to exceed \$1,000 and/or up to 1 year imprisonment plus confiscation of tapes.	Unlawful to knowingly manufacture, distribute or retail a recording whose sounds are transferred without consent of the owner.
WEST VIRGINIA Senate Bill 220 approved 3/12/76	June 12, 1976	Misdemeanor	Fine of up to \$1,000 and confiscation and destruction of unauthorized recordings and the equipment used to make them.	Unlawful to knowingly transfer without the owner's consent, recorded sounds with the intent to sell same; unlawful to knowingly, or with reasonable grounds to know, advertise, offer or possess for sale, or sell any such sound recording. Also unlawful to sell a recording not bearing the name and address of the manufacturer and the name of the actual artist or group.
WISCONSIN 943.207	June 4, 1976	Misdemeanor	Manufacturing: 1st offense—fine of not more than \$2000 and/or imprisonment for not more than six months. 2nd offense—fine of not more than \$8000 and/or imprisonment for not more than nine months. Sale: Fine of not more than \$1000 and/or imprisonment for not more than six months.	Unlawful to knowingly transfer, without the owner's consent, recorded sounds with the intent to sell same; unlawful to advertise, sell or offer for sale such recordings with the knowledge that they have been unlawfully recorded.

April, 1977

STATE	EFFECTIVE DATE	TYPE OF OFFENSE	PENALTIES IMPOSED	SCOPE OF COVERAGE
Montana Sec 85-601 et seq Revised code of Montana (Chap 367, Acts of 1977)	April 14, 1977	Felony (manufacture)/ Misdemeanor (sale)	Imprisonment for up to ten years for manufac- turers; a fine of up to \$500 and/or imprisonment for up to six months for sellers. Also confisca- tion of sound recordings manufactured in violation of this section and the equipment used to make them.	Unlawful to knowingly manu- facture: 1. recordings whose sounds are transferred without the owner's consent. 2. re- cordings of performances, live or broadcast, without the per- former's consent. Unlawful to sell such recordings or to sell recordings without the name and address of the manufacturer and name of the performing artist(s).
North Dakota Senate Bill 2366 (1977)	July 1, 1977	Felony (manufacture)/ Misdemeanor (sale)	Imprisonment for up to five years and/or a fine of up to \$5000 for manu- facturers; imprisonment for up to 30 days and/or a fine of up to \$500 for sellers. Also confisca- tion of sound recordings manufactured in violation of this section and the equipment used to make them.	Same as above
CONNECTICUT Gen. Stat. Ann. 3-142 b,c,d	October 11, 1974	Misdemeanor Felony (Class D)	Fine of not more than \$1,000 and/or imprison- ment for not more than one year. Subsequent offense--Fines of up to \$2,000 and/or not more than one year imprison- ment.	Unlawful to knowingly man- ufacture, distribute, sell or advertise for sale a recording whose sounds have been transferred with- out the owner's consent. Unlawful to rent or make available equipment for such transfers. Also un- lawful to knowingly sell a recording not bearing the name and address of the manufacturer.

<u>STATE</u>	<u>EFFECTIVE DATE</u>	<u>TYPE OF OFFENSE</u>	<u>PENALTIES IMPOSED</u>	<u>SCOPE OF COVERAGE</u>
MISSOURI B 92	September 15, 1977	Felony/Misdemeanor	First Offense -- fine of not more than \$1,000 and/or imprisonment for up to six months. 2nd offense(manufacture only)imprisonment for not more than two nor less than five years	Unlawful to knowingly transfer, without the owner's consent, recorded sounds with the intent to sell same; unlawful to knowingly or with reasonable grounds to know, advertise, offer or possess for sale, or sell any such sound recording. Also unlawful to sell a recording not bearing the name and address of the manufacturer and the name of the actual artist or group.
NEW HAMPSHIRE .H. Rev. St. t. Ann. ect. 352-A: 1	August 30, 1977	Felony(for manufacture) Misdemeanor(for sale)	Imprisonment for up to seven years and/or a fine of up to \$2,000 for manufacturers; imprisonment for up to one year and/or a fine of up to \$1,000 for sellers. Also confiscation of sound recordings manufactured in violation of this section and the equipment used to make them.	Unlawful to knowingly manufacture: 1. recordings whose sounds are transferred without the owner's consent. 2. recordings of performances, live or broadcast, without the performers' consent. Unlawful to sell such recordings or to sell recordings without the name and address of the manufacturer and name of the performing artist(s).

<u>STATE</u>	<u>EFFECTIVE DATE</u>	<u>TYPE OF OFFENSE</u>	<u>PENALTIES IMPOSED</u>	<u>SCOPE OF COVER</u>
FLORIDA F.S. 543.041	July 1, 1977	Felony/Misdemeanor	Imprisonment for up to five years and/or fine of up to \$5,000 for manufacturers; imprisonment for up to 60 days and/or a fine of up to \$500 for sellers. Also confiscation of sound recordings manufactured in violation of this section and the equipment used to make them.	Unlawful to knowingly manufacture: 1. Recordings whose sounds are transferred without the owner's consent. 2. Recordings of performances live or broadcast, without the performer's consent. Unlawful to sell such recordings or to sell recordings without the name and address of the manufacturer and name of the performing artist(s).

EXHIBIT 2.

**Court Decisions Proscribing Record and
Tape Piracy.**

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UNITED STATES SUPREME COURT

Goldstein v. California, 412 U.S. 546 (1973).

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NEW YORK

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OREGON

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